

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

JACK and LA VONNE DANIELS,

Appellants,

v.

STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY;
CITY OF YAKIMA; DAVID
RODMAN and SALLY STROTHER,

Respondents.

PCHB No. 87-76

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter, the appeal of an approval of a sewer extension by the Department of Ecology, came on for hearing before the Board at Yakima, Washington, on July 28, 1987, Wick Dufford, presiding. Board members Lawrence J. Faulk and Judith Bendor have reviewed the record. Respondent Department of Ecology elected a formal hearing pursuant to RCW 43.21B.230.

Appellants were represented by Frank L. Kurtz, Attorney at Law. Respondent Department of Ecology was represented by Peter R. Anderson, Assistant Attorney General. Respondents Rodman and Strother were

1 represented by Robert J. Reynolds, Attorney at Law. The City of
2 Yakima appeared through John Vanek, Assistant City Attorney.

3 Witnesses were sworn and testified. Exhibits were examined. From
4 the testimony heard and exhibits examined, the Pollution Control
5 Hearings Board makes these

6 FINDINGS OF FACT

7 I

8 The Department of Ecology is an agency of the State of Washington
9 with authority to implement the provisions of the water pollution
10 control laws of the state, including the authority to approve plans
11 for sewage systems prior to their construction.

12 II

13 On March 12, 1984, Ecology issued an Order (No. DE 84-186) to the
14 Yakima County Health District. The Order recited that sewer service
15 areas had been established in most of the municipalities of Yakima
16 County and that the failure of on-site septic tank and drainfield
17 systems had become a widespread problem. The Order required the
18 County to cease issuing permits for new on-site waste disposal systems
19 without Ecology's review and approval of such permits.

20 III

21 The application of David Rodman, a home builder,,to install an
22 on-site sewage disposal system at a new home being built at 7507
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25

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27 FINAL FINDINGS OF FACT

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(2)

1 Englewood Avenue, Yakima, came before Ecology in the late summer of
2 1985. Because of the shallowness of soils on the site, a mound system
3 was proposed.

4 On September 12, 1985, Ecology approved the proposal, subject to
5 conditions, including the following:

6 The subject property shall hook up to the sanitary
7 sewer system within one (1) year of the availability
of sewer service.

8 It should be noted that the extension of sewer lines
9 by the City of Yakima may make sewer available
10 within one (1) year. Therefore, the expenditure for
a new on-site system will have an estimated useful
life of two (2) years.

11 Ecology regarded this as a short-term approval for the on-site
12 system.

13 IV

14 The purchasers of the new home at 7507 Englewood Avenue were Jack
15 and La Vonne Daniels, who were moving to Yakima from Washington, D.C.
16 The property was owned by Sally Strother, who entered into a sales
17 agreement with the Daniels in September of 1985.

18 At some point the original plans for a permanent septic system
19 were abandoned. A small on-site system, designed only for temporary
20 use, was built with the expectation that the availability of the
21 city's sewer was imminent.

22 The Yakima Health District approved the "temporary" system with a
23 1000 gallon septic tank and 120 square feet of drainfield, on February
24

12, 1986, with the following caveat:

Be advised that the size of the system has been greatly reduced because the house is to be connected to the City of Yakima sewer in the near future. Use of the system is approved until June 1, 1986 or until city sewer is available.

The Daniels moved into the house in February of 1986 with the "temporary" on-site system in place.

V

During the course of the project for the Daniels' home, differences developed between the purchasers and the seller and the contractor. On this record the cause and details of the dispute were not made clear, but its essence is an issue of how much money should be paid out by the buyer.

At the time of the hearing before this Board, this dispute remained unresolved.

VI

The southern boundary of the Daniels' lot does not directly abut the public sewer easement. On June 24, 1986, Sally Strother took a quit claim deed to a small fragment of property which lies between the Daniels' lot and the public easement. On the basis of a survey, she had concluded that the Daniels' "temporary" drainfield was on this fragment of property.

On June 25, 1986, she wrote to the Daniels' and demanded that the use of the drainfield be discontinued within 30 days. The Daniels'

1 did not comply with this demand, but continued to live in the house
2 and use the "temporary" system.

3 VII

4 On September 29, 1986, the Yakima Health District issued an Order
5 to the Daniels "to proceed immediately with securing an adequate means
6 of sewage disposal or vacating your house."

7 In the Order, Health Officer Robert G. Atwood, M.D., stated:

8 I am now aware that you and your contractor, Dave
9 Rodman, are at impasse about what payment is due him
10 and that he refuses to proceed with sewer
11 construction until agreement is reached. Our staff
12 has delayed enforcement of the temporary permit to
13 allow sufficient time for settlement of the
14 financial issue. The matter is unresolved, and the
15 temporary system is inadequate to serve you
16 further. In fact, some early signs of failure are
17 evident."

18 VIII

19 Subsequently, the Daniels had the "temporary" system
20 professionally inspected and were advised that it was not failing.
21 They entered into an arrangement by which the system would be checked
22 periodically and the tank pumped as necessary to assure normal
23 function.

24 No further enforcement action was taken by the Health District
25 against the Daniels. Instead, on March 5, 1987, the Health District
26 advised that it would make routine inspections of the Daniels'
27 "temporary" on-site system, and asked for copies of all receipts for

pumping the system. The Daniels were requested to provide an idea of when they would be connecting to the sewer, but the District stated:

This request is not an effort to set a deadline, but the information will help us evaluate if the existing system will function effectively until the sewer connection is accomplished.

IX

In late February 1987, the Health District wrote to the Yakima City Engineering Department urging the completion of a sewer connection to the Daniels' residence. The letter noted that Daniels' on-site system "is being used primarily as a holding tank with routine pumping." The District advised that other lot owners in the area on property platted by David Rodman desired access to a sewer extension as well.

X

Yakima is extending its sewer mains into unincorporated areas around the City, such as that involved here. Developers, like Rodman, build sewer extensions from the mains along dedicated public easements to provide the means for connecting new homes. These extensions must be built in accordance with plans approved by the City and by Ecology. The developers are reimbursed for their costs by the assessment of shares from the homeowners who hook up. The ownership of the sewer extension is transferred to the City which then assumes responsibility for operation, repair and maintenance.

XI

Eventually it became necessary for Rodman to build the sewer extension contemplated for his approved plats in order to provide promised sewer service to a new house on a lot other than Daniels'.

Plans submitted by Rodman to the City were forwarded by the City to Ecology for review on March 18, 1987. On forwarding the plans, the City pointed out that the planned sewer was physically located so it could serve the Daniels' residence. However, the City stated that it was aware of a dispute over access to the proposed sewer line by the Daniels.

The dispute referred to was over obtaining a private easement from the Daniels' property across the fragment owned by Sally Strother to the sewer.

XII

Ecology initially responded to the plan submission with a number of written comments, including the following:

Of particular concern to us is the wisdom of going ahead with this extension in light of the fact that easements are not in place to serve property for which Mr. Rodman applied for on-site approval and received only short term on-site approval with specific directions for future hook-up [enclosing the letter of September 12, 1985 quoted above in Finding of Fact III]. Sewering is overdue for these sites.

XIII

Finally, on April 16, 1987, Ecology approved the sewer extension

1 project with, among others, a special condition requiring the filing
2 of a sewer utility easement for a gravity sewer extension to serve the
3 Daniel's property. The condition included the following language:

4 Such easement shall in no case preclude hookup after
5 1 year of completion of sewer construction.

6 On the same day, a document reciting the terms of a proffered
7 easement from Sally Strother to Jack and La Vonne Daniels for the
8 installation and maintenance of a sewer line on the fragment owned by
9 Strothers was filed at Ecology's offices. The easement was made
10 subject to the limitation that:

11 Said easement will not be usable by Grantees or
12 their successors for a period of one year after the
13 acceptance of David Rodman Sewer Main by the City of
14 Yakima, unless otherwise approved by grantor.

15 The document also prohibited use of the easement until the Daniels'
16 paid the City of Yakima ¹/₅ of the actual cost of the sewer
17 extension project and it called for the payment to the grantor of a
18 sum in the neighborhood of \$1500 prior to any utilization of the
19 easement.

20 XIV

21 The Daniels' appealed Ecology's approval of the sewer extension to
22 this Board on April 20, 1987, requesting an order staying the approval.

23 On April 27, 1987, argument was heard on the stay issue. On the
24 assurances of the parties that construction of the extension would not

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(8)

1 damage the Daniels' existing on-site system, the Board denied the Stay.

2 XV

3 Thereafter the sewer extension was undertaken and on May 11, 1987,
4 the project was completed. On July 23, 1987, the City of Yakima
5 executed a Declaration of Construction of Water Pollution Control
6 Facilities certifying to Ecology the completion of the project in
7 accordance with the plans and specifications.

8 XVI

9 At the time of our hearing, the Daniels' had not accepted the
10 easement from Sally Strother on the terms under which it was offered
11 to them. Ecology's representative testified that the easement
12 document filed with the agency satisfied Ecology's condition of
13 approval. He said Ecology was unconcerned with the price the grantee
14 was seeking in exchange for granting the easement.

15 XVII

16 The plumbing in the Daniels' house was installed to accommodate
17 connection by gravity flow to a sewer line to the south. This is the
18 direction in which Sally Strother's fragment of property blocks access
19 to the public sewer, absent a private easement. Though the cheapest
20 and most logical, the southern route is not the only available sewer
21 access for the Daniels. On the north, their property borders a public
22 easement and they could connect up in this direction by installing a
23 pumping system capable of a 8 to 12 foot lift.

1 The record does not disclose whether the Daniels have explored
2 with Ecology and the Health District the possibility now of converting
3 to a permanent on-site installation, appropriately sized and using a
4 mound system as initially proposed.

5 The costs of either a northerly connection to the sewer by pump or
6 a permanent mound system would exceed the costs of connecting to the
7 south with gravity flow to the sewer.

8 XVIII

9 No evidence was offered on physical facts relating to the sewer
10 system, its design, function or capacity to handle the projected
11 load. No evidence was provided which showed that the quality of any
12 public waters would be threatened by the construction and operation of
13 the sewer extension at issue in accordance with the plans and
14 specifications submitted.

15 XIX

16 Any Conclusion of Law which is deemed a Finding of Fact is hereby
17 adopted as such.

18 From these Findings, the Board makes the following

19 CONCLUSIONS OF LAW

20 I

21 The board has jurisdiction over these parties and these matters.
22 Chapters 43.21B RCW and 90.48 RCW.

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II

Ecology's role in the approval of sewer extensions is derived from RCW 90.48.110. That section reads:

All plans and specifications for the construction of new sewerage systems, sewage treatment or disposal plants or systems or for improvements or extensions to existing sewerage systems or sewage treatment or disposal plants, and the proposed method of future operation and maintenance of said facility or facilities, shall be submitted to and be approved by the department, before construction thereof may begin. No approval shall be given until the department is satisfied that said plans and specifications and the methods of operation and maintenance submitted are adequate to protect the quality of the state's waters as provided for in this chapter. (Emphasis added).

III

Appellants have not demonstrated any shortcomings in the engineering or design of the subject sewer extension which would interfere with its effective functioning in carrying away domestic wastes. We conclude that the physical features of the system were not proven inadequate to protect the quality of the state's waters.

IV

Moreover, we conclude that no risk to the quality of the state's waters is necessarily inherent in the situation, even if the Daniels are unable to hook up to the sewer to the south by gravity flow. The possibilities of hook-up to the north or of a permanent on-site system make the problem one involving the need for choice, not one in which the subject sewer extension itself threatens to violate the statutory standard.

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FINAL FINDINGS OF FACT

CONCLUSIONS OF LAW & ORDER

(11)

V

In the instant case Ecology conditioned the approval of the sewer extension on the filing of a private easement offered to the Daniels. The agency further required the easement to allow access not later than a year from the date of sewer project completion.

Respondents did not appeal Ecology's conditions of approval and are, therefore, bound by them. An easement must be available to the Daniels. To require more, however, is to become involved in the resolution of the private dispute of the parties. Such involvement would entangle Ecology (and this Board) in an area far afield from the approval or disapproval of sewer extensions on the basis of water quality protection.

VI

The Department of Ecology is an administrative agency created by statute and without inherent or common-law powers. It may exercise only those powers expressly conferred by statute or necessarily implied therefrom. *Human Rights Commission v. Cheney School District*, 97 Wn.2d 118, 641 P.2d 163 (1982).

We do not doubt Ecology's implied authority to condition the approval of sewer extensions with provisions necessary to advance the statutory aim of water quality protection. See State v. Crown Zellerbach Corp., 92 Wn.2d 894, 602 P.2d 1172 (1979). Where not already compelled locally through the plat approval process, such power to condition may include authority to require appropriate

1 dedications to the public for sewer lines in new developments.

2 But, in this case appellants ask us to reform an offered private
3 easement to make its terms more favorable to them. Under the facts
4 here where alternate means of access or disposal exist, we perceive no
5 necessity for Ecology to dictate the terms of the exchange of property
6 interests between private parties.

7 VII

8 Any Finding of Fact which is deemed a Conclusion of Law is hereby
9 adopted as such.

10 From these Conclusions the Board enters the following
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ORDER

The action of the Department of Ecology in approving the sewer extension proposed by David Rodman is affirmed.

DONE this 2nd day of June, 1988.

POLLUTION CONTROL HEARINGS BOARD

Wick Dufford
WICK DUFFORD, Presiding

Lawrence J. Faulk 6/2/88
LAWRENCE J. FAULK, Member

Judith A. Bendor
JUDITH A. BENDOR, Member